In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 175

MARK J. GERRY, INC., d/b/a DOVE MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 355 F. 2d 727. The decision and order of the Board (R. 52-54, 66)[1] are reported at 145 NLRB 1379.

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[1] "R." refers to the volume of pleadings and "Tr." to the transcript, both of which were filed in the court of appeals.

JURISDICTION

The decision of the court of appeals was entered on January 5, 1966 (Pet. App. 1). Petitions for rehearing were denied on March 14, 1966, and the court's judgment was entered on April 25, 1966. The petition for a writ of certiorari was filed May 26, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner discharged an employee for union activities, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act.

STATEMENT

Petitioner is engaged in the manufacture of women's clothing in Los Angeles, California (R. 33; 5, 8). In September 1960, a labor organization known as the "Employees' Group" was certified as collective bargaining representative for petitioner's production and maintenance employees, and it executed a collective bargaining agreement with petitioner (Pet. App. 1, R. 34; Tr. 85). The collective bargaining agreement had a term of two years and was subject to automatic renewal from year to year thereafter (Pet. App. 1, R. 34). For approximately the next two years, the Employees' Group held no meetings, collected no dues, elected no officers, adopted no constitution or bylaws, and processed no grievances (R.

36; Tr. 87, 88-91). On July 19, 1962, the Union[2] filed a petition to represent the employees in the unit and, on September 6, 1962, the Board directed a representation election (Pet. App. 1-2, R. 34).

Beginning in September 1962, petitioner permitted the Employees' Group to hold meetings in the plant lunchroom, at lunch and after hours; provided loudspeaker and posting facilities for the announcement of these meetings; sent supervisors to attend and participate in the meetings; allowed posters for the Employees' Group to be put up in the lunchroom; promulgated campaign literature attributing employee benefits to the contract with the Employees' Group and attached such literature to the employees' paychecks (Pet. App. 2, 3, R. 36-37, 39-41). When the Union requested posting and meeting facilities comparable to those granted the Employees' Group, petitioner denied the request (Pet. App. 2, 3, R. 41-42).

On October 2, 1962, the day of the representation election, employee Ozie Perkins talked to other employees during the lunch hour, urging them to vote and sign cards for the Union (Tr. 129-130). Perkins served as the employee observer for the Union at the election and attended a meeting with management as one of the Union's representatives just before the election (R. 43; Tr. 131). Neither the Employees' Group nor the Union received a majority of

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[2] The Los Angeles Dress & Sportswear Joint Board, a subordinate body of the International Ladies' Garment Workers' Union, AFL-CIO, and Local 986, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

the votes cast; a runoff election was accordingly directed (R. 35).

In the three weeks following the election, petitioner reprimanded Perkins for being 10 or 15 minutes late one morning and for being absent without calling in one day when her son was sick (R. 44-46; Tr. 135, 138-140, 310, 380-381, 383-384, 391). On October 26, petitioner's production manager passed within two or three feet of Perkins as she was talking to a Union organizer in front of the plant during the lunch period (R. 44; Tr. 131). That afternoon, the manager called Perkins to his office and discharged her, allegedly for tardiness and absenteeism (Pet. App. 2, 3, R. 44, 45; Tr. 130, 132, 313).

Perkins had worked for petitioner almost ten years at the time of her discharge and was admittedly one of its "best operators" (R. 43; Tr. 127, 324). Like other employees in her section, Perkins had long followed irregular hours of employment, coming to work late several times a week and taking an occasional day off without notice (R. 44; Tr. 134, 326-327). Since the employees were paid on a piece rate, for work actually performed, petitioner had accepted this practice for many years (Tr. 385-386, 389-390).[3]

On these facts, the Board found that petitioner had violated Section 8(a)(2) and (1) of the Act by

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[3] Early in 1962, when Perkins represented the girls in her department in requesting a wage increase because they were making only $8 or $9 a day, petitioner's production manager told her: "You girls have a good thing here. You walk in when you get ready * * * walk out when you get ready * * * [and] take off when you get ready" (Tr. 145-146).

contributing unlawful assistance and support to the Employees' Group while denying comparable benefits to the Union, and that it had violated Section 8(a)(3) and (1) by discharging Ozie Perkins for her activities in support of the Union (R. 47-50, 66). The Board's order directed petitioner to cease and desist from the unfair labor practices found; to withhold recognition and cease maintaining a collective bargaining agreement with the Employees' Group unless it was certified as the employees' bargaining representative following a Board-conducted election; to reinstate employee Ozie Perkins with back pay; and to post appropriate notices (Pet. App. 2-3, R. 52-53, 66). The court of appeals determined that substantial evidence supported the Board's findings and enforced the order except for the provisions requiring petitioner to cease maintaining a collective bargaining agreement with the Employees' Group (Pet. App. 3, 4-7, 8).[4]

ARGUMENT

The only question presented by the petition is whether substantial evidence supports the Board's finding that petitioner, in violation of Section 8(a)(3) and (1) of the Act, discharged employee Ozie Perkins because of her union activities. The holding

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[4] The court refused to enforce this portion of the Board's order because "it appeared that the agreement was consummated nearly two years before the inception of any unfair labor practices and at a time when the Employers' [*sic*] Group was manifestly the duly authorized and designate[d] representative of the employee bargaining unit" (Pet. App. 6).

of the court below that the Board's findings are so supported (Pet. App. 3) does not warrant review by this Court. See *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 340 U.S. 498, 502-503. In any event, the facts summarized in our Statement, pp. 3-4, *supra*, make it clear that the Board was fully justified in concluding (R. 44-46) that petitioner discharged Perkins because of her union activities and not for tardiness or absenteeism.

Petitioner's contention (Pet. 2, 5, 9) that Section 10(c) of the Act, which provides that the Board shall not order reinstatement or back pay for any individual "suspended or discharged for cause," bars the Board from ordering Perkins' reinstatement with back pay raises again the question whether substantial evidence supports the Board's finding that Perkins was discharged for union activities rather than "for cause." Similarly, the fact that the collective bargaining agreement with the Employees' Group authorized Perkins' discharge "for good and sufficient reason" (Pet. 5, 9-10) is irrelevant in light of the Board's finding, supported by substantial evidence, that Perkins was discharged for union activities. And, insofar as petitioner may be contending that its contract with the Employees' Group could authorize the discharge of employees for engaging in rival union activities or that it could deprive the Board of jurisdiction to remedy such discharges, its contention is plainly unsound.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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